KATAR SINGH v. MANUEL & ANOR.

[A. C. J. (Thomson J.) August 11, 1955]
[Ipoh — Civil Appeal No. 9 of 1954]

Subordinate Courts Rules, 1950, O. 10 — No defence filed — No objection raised at trial — Whether objection can be taken on appeal.

In this case the plaintiff had filed a statement of claim but the defendants did not file their defences. They were however allowed to proceed and make their defences. The principal ground of appeal was that the defendants had not complied with the provisions of Order 10 of the Subordinate Courts Rules relating to the filing of defences.

Held: as the point was not taken at the trial, the appellant cannot raise it at the appeal.

Cases referred to:—

(1) *Davies v. Galmoye* (1888) 39 Ch. D. 322.
(2) *Dyott v. Neville* (1887) W.N. 35.

CIVIL APPEAL.

N. Sharma for the appellant.
Respondents not represented.

Thomson J. (delivering oral judgment) : — The principal ground of appeal in this case is lack of compliance with the provisions of Order 10 of the Subordinate Courts Rules relating to the filing of defences. The plaintiff filed a Statement of Claim and the defendants filed no Defences but at the trial they were allowed to proceed and make their defences.

It is said that this vitiated the proceedings because in the first place non-compliance in itself was in itself sufficient for that purpose and because in the second place the plaintiff was taken by surprise by certain matters raised in evidence by the defendants and that therefore there was a miscarriage of justice.

It would appear from the record that this point was not taken at the trial. I am in very grave doubts as to whether it is even open to the appellant to raise it at this stage. I read from the 1955 *Annual Practice* at page 1251 :—

"An objection to procedure not taken in the Court below was not allowed to be taken in the Court of Appeal"

and the authorities for that are said to be the cases of *Davies v. Galmoye*[1] and *Dyott v. Neville*[2].

In any event, even if it is open to the appellant to take the point now, I think it must fail for two reasons.

In the first place I am of the opinion his failure to take it at the trial amounted to waiver and in the second place I see no reason to suppose that even if he was taken by surprise by the two points to which he refers in the defendants' evidence he was in any way prejudiced. One of these points was in his favour and was an admission against the defendants. The other was a piece of irrelevant abuse of the type that is unfortunately only too common. It had nothing whatever to do with the case.

The whole question resolved itself into a series of questions of credibility. The Magistrate has dealt with the evidence in his Grounds of Judgment very fully and very carefully. I see no reason for interfering with his judgment in any way.

The appeal is dismissed.

Costs to the First Respondent.

There will be no costs to the Second Respondent because he has not been served.

Appeal dismissed.

LOKE YEW MINES LTD. v. EU KENG CHEE & ORS.

[O. C. J. (Wilson J.) August 15, 1955]
[K. L. — Mines Civil Suit No. 3 of 1955]

Mining Enactment (Cap. 147), ss. 16(iii) and 97 — Application for cancellation of mining sub-lease.

Under s. 97 of the Mining Enactment if it is proved that the sub-lessee has failed to observe the conditions referred to in paras. (a), (b), (c) and (d) of sub-s. (ii) of the same section, the lessors are entitled to an order of cancellation unless the sub-lessees can show that there are reasons why the Senior Inspector of Mines or the Court should exercise discretion in favour of the sub-lessee.

MINES CIVIL SUIT.

C. Mills for the complainant.
D. G. Rawson for the respondents.

Wilson J. : — The complainant company is the registered owner of the land held under Mining Lease No. 4181, Portion 1011, in the Mukim of Ampang. The respondents are the executors and trustees of the will and estate of Eu Tong Sen, deceased, and are sued as such. The land was sub-leased to Eu Tong Sen on the 20th November, 1937. Eu Tong Sen died in Hongkong some years ago. The company claims that the respondents have committed breaches of clause 4 of the sub-lease, in that since the 28th May, 1954 they have failed to work the land in accordance with clause 4 of the said sub-lease, and of clause 8(iii) of the sub-lease in that they have not during the six months prior to the date of the complaint employed at least 28 labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii) (b) of the Mining Enactment, 1928, for not less than one month in mining the land. For these reasons they ask that the sub-lease may be cancelled.